

HR 21A-D13.3

REPEALING SECT 25 OF ACT OF 1789
ESTABLISHING THE JUDICIAL SYSTEM RELATING TO
DIRECT APPEAL FROM A STATE COURT TO THE SUPREME COURT
OF THE U.S.

9. 10/11/1789 The Committee on the Judiciary to which was referred a resolution instructing that Committee to enquire into the expediency of repealing or modifying the twenty fifth section of an act entitled "An Act to establish the judicial Courts of the United States" passed on the 4th September 1789.

Report:

That the Committee profoundly impressed with the importance of the matter referred to their consideration, have bestowed upon it that deliberation ^{it} so eminently required and the investigation has resulted in a solemn conviction that the twenty fifth section of an act of Congress entitled "An Act to establish the judicial Courts of the United States" passed on the 4th September 1789, is unconstitutional and ought to be repealed.

The reasons that have induced this opinion the Committee will now present for the consideration of the House.

The declaration of independence, the Treaty of peace with Great Britain, and the articles of confederation, all announce to the world that the States of the confederacy were free sovereign and independent States; and that they had a right to make treaties form alliances and to do any other acts that any independent sovereignty could do. In the character of sovereign States, the old confederation and the present federal Government were alike formed and established. The defects of the old Confederation which rendered necessary the existing Federal Government were its inability to couse State to contribute its quota of supplies to the General Treasury, and its want of adequate power to manage conduct and control our commercial and foreign relations. (P) It was perceived in the Convention that framed the constitution, that a Federal Judiciary was indispensably necessary as a coordinate department of the contemplated Government; and the convention accordingly by the following clauses of that

instrument created such a Department and invested it with powers therein specified.

Article III. Section 1.

The Judicial power of the United States shall be vested in one Supreme Court, and such other inferior Courts as Congress may from time to time ordain and establish. The Judges both of the Supreme and inferior Courts shall hold their offices during good behavior and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in Office.

Section 11.

The Judicial power shall extend to all cases arising under this constitution of the laws of the United States, and treaties made or which shall be made under their authority: to all cases affecting Ambassadors, other Public Ministers and consuls: to all cases of admiralty and maritime jurisdiction: to controversies to which the United States shall be a party: to controversies between two or more States: between a State and the citizens of another State: between citizens of different States: between citizens of the same state claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting Ambassadors, other public Ministers and consuls and those in which a State shall be a party, the Supreme Court shall have original Jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate Jurisdiction both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Amendment
Article Eleventh.

The judicial power of the United States, shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State.

The twenty fifth section of the Act to establish the judicial Courts of the United States is in these words—

Section XXV.

"A final judgment or decree in any suit, in the highest Court of law or equity of a State in which a decision in a suit could be had, where is drawn in question the validity of a treaty, or ~~Statement~~^{Statute} of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a Statute of or an authority exercised under the United States, and the ~~authority~~^{decision} is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty or Statute of, or Commission held under the United States, and the decision is against the title right privilege or exemption specially set up or claimed by either party, under such clause of the said constitution treaty statute or commission, may be re-examined and revised or affirmed in the Supreme Court of the United States, upon a writ of error: the citation being signed by the Chief Justice or Judge or Chancellor of the Court rendering or passing the judgment or decree complained of, or by a Justice of the Supreme Court of the United States in the same manner and under the same regulations, and the writ

shall have the same effect, as if the judgment or decree complained of, had been rendered or passed in a Circuit Court, and the proceedings upon the reversal shall also be the same, except that the Supreme Court, instead of ~~reversing~~^{remanding} the cause for a final decision as before provided, may at their discretion if the cause shall have been ~~once~~^{remanded} ~~reversed~~ before, proceed to a final decision of the same, and award execution. But no error shall be assigned as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said Constitution treaties Statutes commissions or authorities in dispute - "

In the above mentioned sections, Congress gives the power of a direct appeal from a State Court to the Supreme Court of the United States, but in the opinion of the Committee the Constitution of the United States gives the right of appeal only from such inferior Courts as Congress shall from time to time ordain and establish. If this opinion be wrong, then has the Supreme Court, a supervisory and controlling power ~~at~~^{over} twenty four sovereign States. Before entering into a particular comparison of the above section of the Judicial Act of 1789, with the first and second section of the third article of the Constitution of the United States, the Committee beg leave to make a few preliminary remarks, (which it is hoped will not be deemed impertinent to the matter referred) on the peculiar character and structure of our complex system of Government.

The most universally received Maxim in the theory of political liberty since the establishment of American Independence is, that the people alone have the right either directly or by representative conventions, to make or alter their ~~constitutions~~^{constitutions} or forms of Government: and that the Government can do neither. To preserve a Government thus formed, the division and distribution of its powers into separate

Department has also been as universally admitted to be the best security. If the Government or any department of it be allowed to change or alter the constitution, the essential and vital principle of theoretical liberty as established here, with all its securities, must inevitably be destroyed.

This great maxim ought therefore to be vindicated whenever violated. It has never, it is true been contended that the Supreme Court of the United States, or Congress or both powers together can alter the form of the Federal Government; but if the power claimed for the Supreme Court be submitted to, and the twenty fifth section of the judicial act be continued as a part of the judicial system of the United States, that court will have the power without any possible check, to encroach upon the other political departments of the Government.

Much difficulty and embarrassment in discussing questions of political powers and rights arises, from blending and confounding terms usually employed in expressing and describing political laws and judgments. A proper understanding of the distinction between them, will always enable us to detect any attempt of the Government or any department in it to alter or change the Constitution. Political law is made by the people to restrain Government; Civil law is made by the Government to restrain individuals. The former is a rule of action for the governing; the latter a rule of action for the governed.

The Supreme Court virtually claiming the right under the constitution to pronounce political judgments, and asserting the power under the judicial act of carrying them into execution by coercing sovereign States. The Committee readily admit, that there is great difficulty in distinguishing between political laws and judgments, and civil laws and judgments in most of the Governments of the world, but confidently believe that it was foreseen and provided

for by the framers of the Federal Constitution, by
 the ~~admirable~~ division and limitations of power
 we find there, between the Federal and State
 Governments. None deny that such a division of
 powers was made by the constitution between the
 Federal Government and the states by the grant of
 specific powers to the former, and the reservation
 of all ungranted powers to the latter, but a ~~great~~ ^{great}
 diversity of opinion has existed as to the power
 to which resort must be had to determine ^{questions}
 and controversies that might arise between
 the several departments of our Federative system.
 The question is not a new one! - In the great
 political contest in 1798 & 1799 this very question
 made a distinction and marked the line of
 division between the two parties that then
 divided ^{the} country. The Federal party who were
 then in power asserted, that the Federal Court
 (which had just then ^{declared} and enforced as constitu-
 tional the alien and sedition laws) was the
 tribunal of last resort established by the con-
 stitution, to judge of & determine questions
 of controversy between the departments of the
 Federal Government, and between the Federal
 Government and the States. The Republican or
 State rights party of that day on the contrary
 denied that the judicial department of the
 Federal Government, or all the departments of
 that Government conjointly were empowered to
 decide finally and authoritatively ^{in disputes of controversy} in contro-
 versies between a State and the Federal Go-
 vernment, and asserted and insisted that
 there was no common tribunal established
 by the constitution for such a purpose and
 that consequently each party had the right
 to judge of and determine the extent of
 their own rights and powers. The avowed
 political creed of that party was, that the
 union was the result of a compact between
 the people of the several States, in their sovereign
 and corporate capacities & characters of separate
 and independent societies or States, and not as

one entire people forming one nation. That these were the opinions and principles of the Republican party of that day is abundantly proven by Mr. Jefferson Mr Madison and many other able ~~and~~ constitutional Lawyers.

The Committee do not mention the names of these distinguished men for the purpose merely of using their opinions as authority for the principles they advocated, but to establish the fact, that the great body of the American people did pass upon, sanction, and adopt these principles as forming the true theory of our Government, which was manifested by the promotion of these gentlemen to the very stations where these principles were to be tested by action and practice. As it is now a matter of unquestioned history that Mr Jefferson penned the Memorable resolutions commonly called the Kentucky resolutions, and that Mr Madison wrote the Virginia report, the Committee feel entitled to quote them as authority upon questions of constitutional law-

1798
Kentucky Resolutions passed Nov 10th

Resolved, that the several states composing the United States of America, are not united on the principle of unlimited submission to their general government; but that by compact under the style and title of a constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving each State to itself, the residuary mass of right to their own self government; and that whenever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force; that to this compact each State acceded as a state, and is an integral party: - that this government created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would

have made its discretion, and not the constitution, the measure of its powers; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."

~~(II. Resolved, that the Constitution of the United States having delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the high seas, and offences against the laws of nations, and no other crimes whatever~~

The Committee beg leave to add the following extract from the same illustrious source.

That the States of North America which confederated to establish their independence on the Government of Great Britain, became on that acquisition, free and Independent States, and as such, authorized to constitute Governments, each for itself, in such form as it thought best." They declared in the 2nd article of their first confederate Government, that "each state retaining its sovereignty, freedom and Independence, and every power, Jurisdiction & right which is not by this confederacy expressly delegated to the United States ^{in Congress} ~~of America~~ assembled." They afterwards entered into a compact, (which is called the constitution of the United States of America) by which they agreed to unite in a single Government as to their relations with each other, and with foreign nations. & as to certain other articles particularly specified. They ^{retained} ~~retained~~ at the same time, each to itself, the other rights of Independent Government comprehending mainly their domestic interests.

For the administration of their Federal Branch, they agreed to appoint in Conjunction, a distinct set of functionaries, Legislative Executive and Judiciary in the manner settled in that compact: while to each severally and

and of course, remained its original right of appointing, each for itself, a separate set of functionaries, Legislative, Executive, & Judiciary, also for administering the domestic branch of their respective Governments.

Shipley
W. J. G. These two sets of Officers, each independent of the other, constitute thus a whole of Government for each State separately; the powers ascribed to the one, as specifically made Federal, exercised over the whole, the residuary powers, retained for the other, exercisable exclusively over its particular State. Foreign herein, each to the other, as they were before the original compact?

That this is the true exposition of the powers and authorities of the Federal and State Governments, is manifest from the guarded limitation & definition of the grants of power in the compact itself, and by the contemporary discussions & comments, which the Constitution underwent, which justified & recommended it, on the ground that the powers not given to the Government, were withheld from it. But to leave no doubt on the subject the Amendments to the Constitution expressly declare that the powers not delegated to the U.S. by the Constitution, nor prohibited ~~to~~ by it to the States, are reserved to the States respectively or to the people.

W. J. G. The Committee are of opinion that the delegated powers resulting from the compact of Governments to which the States are parties, and limited by the plain sense, and intention of the instrument Constituting that compact, and is no further valid than they are authorized by the grants enumerated in that compact, and that it is incumbent in this, as in every other exercise of Power by the Federal Government, to prove from the Constitution that it grants the particular power exercised. That if the power granted be valid, it is solely because they are granted, and all other powers not granted are not valid. ~~That~~ ^{Testing} the 25th section of the act aforesaid by the foregoing principles and expositions, the Committee cannot perceive any grant of power in

in the Constitution, to warrant the enactment. That the Constitution does not confer power on the Federal Judiciary, over the judicial Departments of the States by any express grant is certain from the fact, that the State Judiciaries, are not once named in that instrument. On the contrary it declares, that the judicial power of the U.S. shall be vested in one Supreme Court and in such inferior Courts as Congress may from time to time ordain & establish, thus giving power to organize a judicial system ~~capable of increasing~~ ^{exercising} every function to which the judicial power of the U.S. extended, "and in-
tending to create a new Judiciary, to ^{exercise} ~~increase~~ the judicial powers of a new Government, unconnected with & independent of the State Judiciaries.

It is no more necessary to the harmonious action of the Federal and State Governments, that the Federal Courts should have power to controul the decisions of State Courts by appeal, than that the Federal Legislature should have power to controul the Legislation of the States or the Federal Executive a state Executive by a negative. It cannot be that when a direct negative on the laws of a State was proposed in convention as part of the Federal Constitution, and rejected that it was intended to confer on the Federal Courts by implication a power subjecting their whole Legislation and their judgments and decrees on it to this negative of the Federal Courts. It cannot be that this prostration of the independency of the State Judicatories, this overthrow of the State Governments as Co-ordinate Powers - could be left to any implication of authority.

Or that it can be necessary for the safety of this Branch of Government that holds the purse & wields the sword of this confederate Republic, to have authoritative control over opinion too - that pure and peaceful arbiters of the affairs of men. The Committee are therefore of opinion that the power to enact the 25th section above recited is not expressed in the Constitution of the U.S. nor properly an incident to any express Power

Power and necessary to its execution". That if continued & acquiesced in as construed by the Supreme Court it raises the decision of the Judiciary above the authority of the sovereign parties to the Constitution, may be a warrant for the assumption of powers not delegated, in the other departments, not carried by the forms of the Constitution before the judicial department, and whose decisions would be equally authoritative & final with the decisions of that department.

However therefore it may be admitted or denied, that the judicial department of the Federal Government, is in all questions submitted to it by the forms of the constitution to decide in the last resort in relation to the authorities of the other departments of that government it can never be authorized so to decide in relation to the rights of the parties to the constitutional compact from which the judicial, as well as the other departments, hold their delegated trusts; on any other hypothesis, the delegation of judicial power, would annul the power delegating it, and the concurrence of this Department in usurped powers, might subvert forever, and beyond the possible reach of any rightful remedy, the very Constitution, which all were instituted to preserve.

"The authority of Constitutions over Government and the sovereignty of the people over constitutions, are truths at all times necessary to be kept in mind" and it is matter of regret to the Committee, that it should ever have been asserted, that the Constitution, on whose face is seen so much labor to enumerate & define the several objects of Federal power, could intend to introduce in the lump in an indirect manner, and by a forced construction, the vast and multiform jurisdiction involved in the section of the law under consideration - a jurisdiction over shadowing the entire field of their Legislation & adjudication; a jurisdiction ~~of the States~~ that saps the foundation of the Constitution, as a system of limited and specified powers: obliterates the sovereignty of so

so many republics, renowned for their defiance of Tyranny, and whose jealous limitations of Power had preserved their liberty, & secured for them a prosperity the wonder & admiration of the world.

Now are the Committee unmindful, that in practice, this disputed power, has given rise to painful collisions in the State & Federal authorities calculated to disturb the harmony of our system and to weaken that confidence and affection which is due to the respective Governments in the Constitutional exercise of all their functions.

The Committee will only add one more extract from Mr Jefferson, which is to be found in a second series of resolutions adopted by the Legislature of Kentucky the 14th November 1799.

"That if those who administer the General Government be permitted to transgress the limits fixed by the compact, by a total disregard to the special delegations of power therein contained, an annihilation of the State Governments and the erection upon their ruins, of a general consolidated government, will be the inevitable consequence: That the principle and construction contended for by sundry of the State Legislatures, that the general government is the exclusive judge of the extent of the powers delegated to it, stops nothing short of despotism; since the discretion of those who administer the government, and not the Constitution, would be the measure of their powers. That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification, by those sovereignties, of all unauthorized acts done under colour of that instrument, is the rightful remedy."

The Committee will now proceed to examine the provisions of the twenty fifth section, and compare them with the powers of the Federal Court as conferred by the Constitution of the United States; and then submit for the consideration of the House two judicial decisions of the highest respectability declaring the said twenty fifth section unconstitutional.

The whole judicial power of the United States is declared by the Constitution to be vested in one Supreme Court, and in such inferior Courts as Congress shall from time to time ordain and establish. Can Congress by Legislation invest State Courts with any portion of that power? Did the convention contemplate in using the term appellate jurisdiction, the right and power of taking an appeal from a State Court to the Supreme Court?

The answer to these questions must be found in the Constitution, and not by travelling out of the record.

The Supreme Court is given original jurisdiction only in two classes of cases, to wit in all cases affecting Ambassadors other Public Ministers and consuls; and those in which a State shall be a party. The only cases in which a State can be a party are 1st where the controversy is between two or more States and 2nd where the controversy is between a State or the citizens thereof, and foreign States. In all other cases before mentioned says the Constitution the Supreme Court shall have appellate jurisdiction. What courts have the original jurisdiction in all those cases before mentioned in the second section of the third article of which the Supreme Court has only the appellate jurisdiction? Let the constitution answer: in "such inferior Courts as Congress shall from time to time ordain and establish". Is a State Court an inferior Court? The Constitution does not say so! If the framers of the constitution had so considered them, and had intended the right and power of taking an appeal from their judgments to the Supreme Court, it was an easy matter, and they doubtless would have said so. Their omitting to do so, is proof irresistible that the power was not intended to be given. It is unreasonable to believe, that they who were so very precise and specific in the enumeration of cases and powers of infinitely moment, would have left ~~unmentioned~~ ^{great} to implication & inference a power that ~~breaks~~ ^{breaks} down all the barriers between the State and Federal Governments.

The Constitution not only invests the whole Judicial power of the United States in two specified tribunals, but also prescribes and declares the duties and rights and tenure of office of the judges who shall constitute them: not one of which is applicable to the courts or judges of State courts. The courts in the first place must be such as are established by Congress; the judges must receive their appointments from the President with the consent of the senate; they are to hold their offices during good behaviour; their compensation cannot be diminished during their continuance in office; and are made liable to be impeached and removed from office by the senate of the United States. Such are the courts and judges that the constitution invested with the jurisdiction of all "other cases before mentioned" in the second section of the third article of that instrument, with the exception of two classes of cases over which original jurisdiction is given to the Supreme Court. Not one of all these requisites characterize state courts or judges. The state courts are not established by Congress: The state judges do not receive their appointments from the President by and with the advice and consent of the senate; they hold their offices not necessarily during good behaviour, but by such tenure as the states shall choose. Their compensation may be diminished at the pleasure of the states; and they are not responsible to, or liable to be impeached before the senate of the United States.

The Committee are aware, that since the able and unanswerable arguments on the twenty-fifth section in the Supreme Court of Virginia, that the advocates of Federal power have assumed the position that the right of appeal is claimed for the Federal Court on the ground that the case arises under the laws, treaties & constitution of the United States, and not on the ground that the state tribunal is an inferior one, from which a writ of error would lie.

The natural result of this will be, that if the position be true it will prove too much. If the nature of the case be the only ground of jurisdiction, will it not authorize the Supreme Court to issue a citation or writ of error to a Court of England or France or ~~Tamsechatta~~, on the pretext that some one of the questions arose under a treaty of the United States? A judicial tribunal of one of those places, is not more independent of the Federal Court, than is a State Court, if the character of the case be the only criterion or authority for Federal jurisdiction. Will it be said, that the right of jurisdiction is limited by the power to enforce the mandates of the Court? This being admitted will not vary the result of the present question. The Federal Courts have the same right to issue a Mandamus & prohibition or process of contempt to a foreign Judge. If the nature of the case can give jurisdiction, as it has to a State Judge; it has also precisely the same power to execute it. If the right existed in the first case to issue, and to execute process, the Supreme Court would virtually, be invested with the power of declaring war; if in the latter case that Court will have the power to blot out from the Map any state of the Union. If the right to issue a mandatory process to the Legislative executive and judicial authorities of a state be admitted to belong to the Federal Court under the constitution, the correlative obligation on these authorities to obey, and the rightful power to enforce it, are obvious and necessary sequents. The Federal Court under these admitted principles, will have the power to prohibit State Legislation by writs of injunction; to sequester State treasuries, and to imprison State functionaries, whether Governors, Judges, or State Legislatures, in a body. Indeed the power will not stop at ~~exercising~~ ^{here} its despotic freaks over State functionaries; the ~~former~~ ^{same} reasoning will sustain a power in the Federal Court to attack and imprison the President and both Houses of Congress. The power by citation or writ of error, to take a case after Judgment, from a State Court

and to remove it for final determination to the Supreme Federal Court, is a much greater outrage on the fundamental principles of theoretical and practical liberty, as established here than the odious writ of quo warranto, as it was used in England by a tyrannical King to destroy the rights of Corporations. The end and aim in both cases were similar; in England it was to make corporations subservient to Kingly pleasure; here, to make States subservient to Federal extravagance and aggrandizement.

The last argument used by the advocates of Federal power is, that the action of the Federal Government will be so crippled by the repeal of the ~~twenty~~ fifth section of the act of '89 that its wholesome operations will be arrested. Although the Committee will not acknowledge that such would be the necessary consequence, yet it may be admitted for the sake of argument without changing the result.

The Committee believe that it is the imperative duty of Congress to repeal without delay any of its acts in contrivention of the constitution be the consequences what they may. If Congress had no power to pass such laws, they are null and void and ought not to remain on the Statute book: if such be really necessary, the power that created the constitution can and will amend it. Necessity and expedience are the pleas of the Tyrant; amendment, the dictate of the Constitution. By pursuing the former course we trample upon the constitution; by following the latter we go back to the people, the original source of all power.

It has also been urged as a branch of this argument, that the 25th section is indispensable to that supremacy of the Federal Court, which is required to preserve the peace of the country with foreign powers, and to render uniform all judgments in treaty cases. The answer to these objections (to the repeal of the 25th section) the Committee believe to be full and perfect in the case of

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4th volume for

of Hunter W. Martin; and prefer presenting it
in the Language of the able Judge who delivered it.
" I have said that this controlling power was not
essential to preserve the peace of the Nation.
Without going to other considerations or authorities
on the subject, it is sufficient to remark that
" the American People have decided that it
is no cause of offence to foreign nations to
" have their causes decided, and exclusively
" and finally decided by the State tribunals. In
" that amendment to the Constitution by which
" the jurisdiction of the Federal Courts is prohibi-
" ted in suits brought against the States by
" foreign Citizens or subjects, this construction
" is most undoubted and has never been complained
" Since the adoption of that amendment, the
" election of jurisdiction has been entirely taken
" away from foreigners in all suits against the
" States. and those suits can now be brought
" in the State Courts in exclusion of every other.
" and that too in cases, in which, from the cir-
" cumstance of the States themselves being parties
" it might perhaps be plausibly ^{urged} ~~argued~~ that the
" Judges of the State Courts were not free from
" bias. I consider that this declaration by
" the American people and which has never exci-
" ted a murmur in foreign Nations, has put down
" the notion now in question. It has settled the
" question for ever, that it is no cause of war
" to Foreign Nations, that the State judiciaries
" should finally decide the causes, elected
" to be brought therein, by their subjects.
" It has consequently overthrown the only
" foundation on which the whole superstruc-
" tion of the twenty fifth section of the judicial
" act has been supposed. to rest.

" That pretence is the only one on which
" the power in question could be attempted
" to be justified. That of rendering uniform
" all judgments in the case of treaties, is still
" less tenable and is even not attained by the actual
" provisions of the judicial act. Under that act

the appeal equally lies to the Supreme Court
 of the United States, where such uniformity already
 exists, and is denied where it is wanting.
 If for example, the Supreme Court of the United
 States, has decided against a treaty, and the
 supreme Court of a State decides the same
 way there this uniformity already exists, and
 yet the appeal is allowed. If on the other hand,
 the former Court decides against a treaty, and
 the latter in favor of it, this uniformity is
 wanting, yet the appeal is denied.

The following is the unanimous opinion
 of the Supreme Court of Virginia in the above
 stated case.

"The Court is unanimously of opinion,
 that the appellate power of the supreme Court
 of the United States, does not extend to this
 Court, under a sound construction of the
 Constitution of the United States; - that so
 much of the 25th Section of the Act of Congress,
 to establish the judicial power of the U. S.
 as extends the appellate ^{power} judicial of the
 Supreme Court to this Court is not in pursu-
 ance of the Constitution of the United States;
 and that the writ of error in this case was
 improvidently allowed under the authority
 of that act; that the proceedings thereon in
 the supreme Court were coram non iudice
 in relation to this Court, and that obedience
 to its mandate be declined by this
 Court."

The Committee will present one more
 judicial opinion of a State Court against
 the powers contended for by the Supreme
 Court of the United States.

The supreme Court of the commonwealth
 of Pennsylvania in the case of the common-
 wealth vs Lobett solemnly and unanimously
 refused to permit the defendant, who was

an alien to remove a cause in which he was sued by the state in its Supreme Court, into a circuit court of the United States notwithstanding the comprehensiveness of the words of the twelfth section of the Judicial act. The court after deciding in the most explicit terms that all power not granted to the Government of the United States remained with the several States that the Federal Government was a league or treaty made by the individual States as one party, and all the states as another: that when two nations differ as to the construction of a league or treaty existing between them neither has the exclusive right to decide it: and that if one of the states should differ with the United States as to the extent of the grant made to them, there is no common umpire between them, but the people by an amendment of the Constitution; went on to declare its own opinion on the subject. and overruled the motion on the ground that the sovereign State of Pennsylvania could not on account of its dignity be carried before that court. This was the solemn and unanimous decision of the Supreme Court of one of the most respectable and republican States of the Union.

The decisions of these tribunals, the Committee consider of high authority and great weight; the judges who composed them were of exalted character patriotism learning and ability. They had taken the same oath imposed upon the federal judges to support the Constitution of the United States, together with the superadded obligation to maintain ^{the} Constitutions of the states, whose judicial powers were confided to them.

The Committee do not pretend to originality in the views and principles of this report; on the contrary they believe they could not better discharge their duty or render a more acceptable service to

the House than by presenting the authorities on which it is founded, Believing the section of the act referred to the consideration of the Committee to be unconstitutional. they herewith report a bill to repeal the same.

Report 25. Sec. 4 art 4. 5th. 1789

Judicial System

Rep. 48.

Jan. 24. 1831

Mr. Davis & S. C. from the
Committee on the Judiciary & which
the subject has been referred
make the following report

030

See Minority Report

Peter
Pieces of the Minority

The Committee on the Judiciary, to which was referred a resolution of the House, of the 21st ultimo, instructing them to inquire into the expediency of repealing or modifying the twenty fifth section of an act entitled "An act to establish the Judicial Courts of the United States", passed the 24 September 1789, having made a report accompanied by a Bill to repeal the same: the Minority of that Committee, differing in opinion from their associates upon this important question, deem it to be their duty to submit to the House the following report.

Paine
The Constitution of the United States has conferred upon Congress certain enumerated powers, & expressly authorized that body, "to make all laws which shall be necessary & proper" for carrying these powers into execution. In the construction of this instrument, it has become an axiom, the truth of which cannot be controverted, that "the General Government, though limited as to its objects, is supreme with respect to those objects".

The Constitution has also conferred upon the President, "by & with the advice and consent of the Senate, provided a two thirds of the Senators present concur," the power to make treaties,

By the second section of the 6th Article of this instrument, it is declared in emphatic language, that "this constitution, and the laws of the United

States which shall be made in pursuance thereof; and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby; any thing in the Constitution or laws of any State to the contrary notwithstanding.

The Constitution having conferred upon Congress the power of legislation over certain objects, - and upon the President & Senate the power of making treaties with foreign nations, the next question which naturally presented itself to those who framed it was, in what manner, it would be most proper that the Constitution itself, and the laws and the treaties made under its authority should be carried into execution? They have decided this question in the following strong & comprehensive language, 'the Judicial power shall extend to all cases in law & equity, arising under this Constitution, the laws of the United States & treaties made, or which shall be made under their authority.' Article 3 Sec 2.

This provision is the only one which could have

been made, in consistency with the character of the Government established by the Constitution. It would have been a strange anomaly had that Instrument established a Judiciary whose powers did not embrace all the laws and all the treaties made under its authority. The symmetry of the system would thus have been destroyed, & in many cases Congress would have had to depend exclusively, for the execution of their own laws, upon the Judiciary of the States. This principle would have been at war, with the spirit which pervades the whole constitution. It was clearly the intention of its framers to create a Government, which should have the power of construing & executing its own laws, without any obstruction from State authority. According to we find, that the Judicial power of the United States extends in express terms "to all cases", in law and in equity arising under the constitution the laws & the treaties of the United States. ~~The~~ general language comprehends precisely what it ought to comprehend.

Of the judicial power of the United States

If the judicial power of the United States
does thus extend to all cases arising under the
Constitution, the laws and treaties of the Union,
how could this power be brought to embrace such
cases, without a law of Congress investing the
Supreme Court with original and appellate
jurisdiction where the Constitution gives it?

It was the imperious duty of Congress to make
such a law, and it is equally its duty to continue
it: indeed without it, the Judicial power
of the United States is limited & restricted
to such cases only, as arise in the Federal Courts,
and is never brought to bear upon numerous
cases, evidently within its range.

When Congress in the year 1789 legislated upon
this subject, they knew that the State Courts
would often be called upon, in the trial of causes,
to give a construction to the Constitution, the treaties
and laws of the United States. What then was
to be done? If the decisions of the State Courts
should be final, the Constitution & laws of the Union
might be construed to mean one thing in one
State, and another thing in another State. #

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All uniformity in their construction would thus be destroyed. Besides, we might, if this were the case, get into serious conflicts with foreign nations, as a treaty might receive one construction in Pennsylvania, another in Virginia, and a third in New York. Some common and uniform standard of construction was absolutely necessary.

To remedy these and other inconveniences, the first Congress of the United States, composed in a considerable proportion of the framers of the Constitution, passed the 25th Section of the Judicial Act of the 22th September 1789 -

It is in the following language.

(Sect 25) And be it further enacted, That a final judgment or decree in any suit, in the highest Court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an au =

thority exercised under, any State, on the ground
of their being repugnant to the Constitution, treaties,
or laws, of the United States, and the decision is
in favor of such their validity, or where is drawn
in question the construction of any clause of the
Constitution, or of a treaty, or statute of, or com-
mission held under, the United States, and the de-
cision is against the title, right, privilege, or
exemption, specially set up or claimed by either
party, under such clause of the said Constitution,
treaty, statute or commission, may be re-examined
and reversed or affirmed in the Supreme Court of
the United States, upon a writ of error, the citation
being signed by the Chief justice, or judge or
Chancellor, of the court, rendering or passing
the judgment or decree complained of, or by a
justice of the Supreme Court of the United States,
in the same manner and under the same
regulations, and the writ shall have the same
effect, as if the judgment or decree complained
of had been rendered or passed in a Circuit Court,

and the proceeding upon the reversal shall also be the same except that the Supreme Court, instead of remanding the cause for a final decision, as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same and award execution. But no other ^{error} shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities, in dispute."

James This section embraces three classes of cases. — The first those in which a state court, should decide a law or treaty of the United States to be void, either because it violated the constitution of the United States, or for any other reason. Ought there not, in such cases, to be an appeal to the Supreme Court of the United States? Without such an appeal, the General Government ^{must} might be obliged to ~~might be a spectator~~, & without the power of redress, behold its own laws and its solemn treaties

annulled by the Judiciary of every State in the Union, without the power of redress.

The second class of cases is of a different character. It embraces those causes in which the validity of State laws is contested, upon the principle that they violate the constitution - the laws or the treaties of the United States, & have therefore been enacted, in opposition to the authority of the "supreme law of the land". Cases of this description have been of frequent occurrence. It has often been drawn into question before the State courts, whether State laws did or did not violate the constitution of the United States. Is it not then essential to the preservation of the General Government, that the Supreme Court of the United States should possess the power of reviewing the judgments of State Courts, in all cases wherein they have established the validity of a State law, in opposition to the Constitution and laws of the United States?

The third class differs essentially from each of the two first. In the cases embraced by it, neither the validity of Acts of Congress, nor of treaties,

nor of State laws is called in question. This clause of the 25th section merely confers upon the Supreme Court the appellate jurisdiction of construing the Constitution, laws & treaties of the United States, when their protection has been invoked by parties to suits before the State Courts, and has been denied by their decision. Without the exercise of this power, in cases originating in the State Courts, the Constitution, laws and treaties of the United States would be left to be finally construed & executed by a Judicial power, over which Congress has no control.

This section does not interfere, either directly or indirectly, with the independence of the State Courts, in finally deciding all cases ^{arising} exclusively, under their own Constitution & laws. It leaves them in the enjoyment of every power which they possessed before the adoption of the Federal Constitution. It merely declares, that as that Constitution established a new form of Government, & consequently gave to the State Courts the power of construing, in certain cases, the Constitution the laws & the treaties of the United States, the Supreme Court of the United States should to this limited extent; but not beyond it, possess

the power of reviewing their judgments. The Section itself declares that "no other error shall be assigned or regarded, as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, & immediately respects the before mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions or authorities in dispute."

Paul Clifford
The Minority of the Committee, will now proceed to advance, in a more distinct form, a few of the reasons why, in their opinion, the 25th section of this act ought not to be repeated.

And in the first place

It ought to be the chief object of all governments to protect individual rights. In almost every case involving a question before a state court, under this section of the Judiciary Act, the constitution laws or treaties of the United States are interpreted for the protection of individuals. Does a citizen invoke the protection of an Act of Congress upon a trial before a state court, which decides that Act to be unconstitutional and void, & renders

judgment against him; this section secures his right of appeal from such a decision to the Supreme Court of the United States.

When ~~if~~ a citizen, in a suit before a State Court, contends that a state law by which he is affected, is a violation of the Constitution of the United States & therefore void, if his plea should be overruled, he may bring this question before the Supreme Court of the United States.

In like manner, when an individual claims any right before a State Court, under the Constitution or laws of the United States, & the decision is against his claim, he may appeal to the Supreme Court of the United States.

If this section were repealed, all these important individual rights would be forfeited.

The history of our Country abundantly proves, that individual States are liable to high excitements & strong prejudices. The Judges of these States would be more or less than men, if they did not participate in the feelings of the Community by which they are surrounded. Under the influence of these excitements, individuals whose rights happen

to clash with the prevailing feeling of the State, would have but a slender hope of obtaining justice, before a State Tribunal. There would be the power and the influence of the State Sovereignty on the one side, & an individual who had made himself obnoxious to popular odium, on the other. In such cases, ought the liberty or the property of a citizen, so far as he claims the same under the Constitution or laws of the United States, to be finally decided before a State Court, without an appeal to the Supreme Court of the United States, on whom the construction of this very Constitution & these laws has been conferred, in all cases, by the Constitution?

The Supreme Court, considering the devoted character of its Judges, & that they reside in parts of the Union, remote from each other, can never be liable to local excitement and local prejudices. To that Tribunal our citizens can appeal with safety and with confidence; (as long as the 25th section of the Judicial Act shall remain upon the statute book) whenever they consider

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that their rights under the constitution & laws of
the United States have been violated by a State
Court. Besides, should this section be repealed, it
could produce a denial of equal justice to parties
drawing in question the constitution, laws or treaties
of the United States. In civil actions, the Plain-
tiff might then bring his action in a Federal
or State Court as he pleased; & as he thought he
should be most likely to succeed; whilst the
defendant would have no option, but must
abide the consequences, without the power
of removing the cause from a State into a
Federal Court, except in the single case of his
being sued out of the District in which he
resides; and this, although he might have a
conclusive defence under the constitution &
laws of the United States.

What Another reason for preserving this section is,
that without it, there would be no uniformity
in the construction and administration of the
Constitution, laws & treaties of the United States.

If the Courts of twenty four distinct sovereign states,
 each possess the power, in the last resort, of deciding
 upon the constitution & laws of the United States,
 their construction may be different in every state
 of the Union. That Act of Congress, which conforms
 to the constitution of the United States, and is
 valid in the opinion of the Supreme Court of
 Georgia, may be a direct violation of the pro-
 visions of that instrument & be void in the
 judgment of the Supreme Court of South
 Carolina. A state law in Virginia might in
 this manner be declared constitutional, whilst the
 same law, if passed by the Legislature of Penn-
 sylvania, would be void. Nay, what would be
 still more absurd, a law, or treaty of the United
 States with a foreign nation, admitted to be
 constitutionally made, might secure rights to
 the citizens of one state, which would be denied
 to those of another. Although the same con-
 stitution and laws govern the Union, yet the
 rights acquired under them, would vary with

every degree of latitude. Surely the framers of the Constitution would have left their work incomplete, had they established no common tribunal to decide its own construction, and that of the laws and treaties made under its authority. They are not liable to this charge; because they have given express power to the Judiciary of the Union over "all cases in law & equity, arising under this constitution, the laws of the U. S. and treaties made or which shall be made under their authority."

The first Congress of the United States have, to a considerable extent, carried this power into execution by the passage of the Judicial Act; and it contains no provision more important than the 25th section.

This section ought not to be repealed; because in the opinion of the minority of the Committee on the Judiciary, its repeal would seriously endanger the existence of this Union. The chief evil which existed under the old confederation, & which

gave birth to the present Constitution was, that
the General Government could not act directly
upon the people, but only by requisition upon
Sovereign States. The consequence was, that the
States either obeyed or disobeyed these requisitions,
as they thought proper. The present Constitution
was intended to enable the Government ^{of the United States}
to act immediately upon the people of the States,
and to carry its own laws into full execution,
by virtue of its own authority. If this section were
repealed, the General Government would be
deprived of the power, by means of its own
Judiciary, to give effect either to the Constitution
which called it into existence, or to the laws
and treaties made under its authority. It
would be compelled to submit, in many important
cases, to the decisions of State Courts; & thus
the very evil which the present Constitution
was intended to prevent would be entailed
upon the people. The Judiciary of the States
might refuse to carry into effect the laws

of the United States; and without that appeal
to the Supreme Court which the 25th Section au-
thorizes, these laws would thus be entirely an-
nulled & could not be executed, without
a resort to force.

James This position may be illustrated by a few
striking examples. Suppose the Legislature
of one of the States, believing the Tariff laws
to be unconstitutional, should determine that
they ought not to be executed within its
limits. They accordingly pass a law imposing
the severest penalties upon the collector &
other custom house officers of the United
States, within their territory if they should
collect the duties on the importation of
foreign merchandise. The Collector proceeds
to discharge the duties of his office under
the laws of the United States, & he is
condemned and punished before a State
Court, for violating this State law. Repeal

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this section, & the decision of the State Court
would be final & conclusive, & any state could
thus nullify any act of Congress which she
deemed to be unconstitutional.

The Executive of one of the States, in a
message to the Legislature, has declared it
to be his opinion, that the land~~s~~ belonging
to the United States within her territory, is now
the property of the State, by virtue of her sov-
ereign authority. Should the Legislature be of
the same opinion, & pass a law for the pun-
ishment of the Land Officers of the United
States who should sell any of the public lands
within her limits, this transfer ^{of property} might be
~~completely~~ ^{virtually} accomplished, by the repeal of ~~the~~
the 25th section of the Judicial Act. Our land
officers might then be severely punished, &
thus prohibited by the Courts of that State
from performing their duty under the laws
of the Union, without the possibility of

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redress, in any constitutional or legal form.

In this manner, the title of the United States to a vast domain, which has cost the nation many millions & which justly belongs to the people of the several States would be defeated or greatly impaired.

Another illustration might be introduced. Suppose the

Legislature of Massachusetts, being of opinion that the Charter of the Bank of the United States is unconstitutional, were to declare it to be a nuisance & inflict penalties upon all its officers for making discounts or receiving deposits. Should the Courts of that State carry such a law into effect, without the 25th section, there would be no appeal from their decision; and the Legislature & Courts of a single State might thus overthrow an Institution, established under the Constitution & laws of the United States.

In all such cases redress can now be peaceably obtained, in the ordinary administration of justice. A writ of error goes from the Supreme Court, which finally decides the question, whether the Act of Congress was constitutional or not; and if they determine in the affirmative, the Judgment of the State Court is reversed. The laws are thus substituted instead of arms, & the States kept within their proper orbit by the Judicial authority. But if no such appeal existed, then upon the occurrence of cases of this character, the General Government would be compelled to determine, whether the Union should be dissolved, or whether there should be a recurrence to

force, - an awful alternative which we trust may never be presented. We will not attempt further to portray the evils which might result from the abandonment of the present Judicial system. They will strike every ^{reflecting} mind.

~~It~~ ^{It} has of late years been contended, that this section of the Judicial Act was unconstitutional, and that Congress do not possess the power of investing the Supreme Court with appellate jurisdiction, in any case, which has been finally decided in the Courts of the States. It has also been contended, that even if they do possess that power, it does not extend to cases in which a State is a party. On this branch of the question we would refer the House to the very able & conclusive argument of the Supreme Court of the United States in the cases of *Martin v. Hunters Lessee* 1st Wheaton 304, & *Chester v. The State of Virginia* 6 Wheaton 264; by which the affirmations of those Justices is clearly established. It may be proper however, ^{that we should} to make a few observations upon this part of the question.

Those who have argued in favor of these positions assert, that the general words of the Constitution, extending the judicial power of the Union, "to all cases in law & equity" arising under the Constitution & Laws of the United States, to such cases in law & equity, ~~of that character~~ ^{ought by construction to be restricted} as may originate in the Courts of the Union.

They would thus establish a limitation at war with the letter, &
 in our opinion equally at war with the spirit of the Instrument.
 Had such been the intention of the framers of the constitution, they
 well knew in what language to express that ~~meaning~~ ^{intention}. Had it been
 their purpose to restrict the meaning of the general language which
 they ^{had} used in the first clause of the section, they could have done so
 with much propriety in the second; ~~and instead of declaring thereby~~
~~that~~ ^{This} ~~that~~ clause after providing, "that in all cases affecting
 ambassadors, other public ministers & consuls, and those in which a
 state shall be a party, the Supreme Court shall have original
 jurisdiction", proceeds to declare "that in all the other cases before
 mentioned, the Supreme Court shall have appellate jurisdiction, both
 as to law & fact, with such exceptions & under such regulations as
 the Congress shall make". On ^{the} ~~these~~ supposition, ^{contended for} it is ~~have~~ ^{have} wholly
 unaccountable, that ^{the framers of the Constitution} ~~they~~ did not limit the natural effect
~~of the words~~ ^{used in the first clause} by ~~limiting & confining the appellate power~~
~~of the Supreme Court~~ ^{making the second to read, "that in all the}
 other cases before mentioned, arising in the inferior Courts of the United
 States, the Supreme Court shall have appellate jurisdiction." ^{But no such restriction exists;} & from the
 fair import of the words used in both clauses, the Supreme Court
 possess the ^{finally} ~~appellate~~ power of deciding, "all cases in law & equity"
 arising under the Constitution, the laws & the treaties of the United States,
 no matter whether they may have originated in a federal or in a
 state court, & no matter whether states or individuals be the
 parties.

Paine

But it is not our intention to enter into a protracted constitutional argument upon the present occasion; because this question has long since been put at rest, if any constitutional question can ever be considered as settled in this country. The *Federalist*, which is ^{now} ~~now~~ considered a text book ~~work of highest authority~~ in regard to the construction of the Constitution, and deservedly so, as well from the great merit of the work as the high character of its authors, is clear & explicit on this subject. After reasoning upon it at some length, the author of the 83^d. number of that production arrives at the following conclusion. "To confine, therefore, the general expressions which gave appellate jurisdiction to the Supreme Court, to appeals from the subordinate federal Courts, instead of allowing their extension to the State Courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation."

The *Federalist*, it will be recollected, was written ^{between} ~~after~~ the formation of the Constitution, & its adoption by the States. Immediately after its adoption ~~the~~ Congress by passing the 25th section of the Judicial Act, now sought to be repealed, fully confirmed this construction. This appellate jurisdiction has ever since been exercised by the Supreme Court, in a great variety of cases; & we are not aware that the constitutionality of its exercise ^{the decision of} ~~has~~ ^{been} ever questioned by any State Court, ^{except in a single instance} ~~within the year~~ which did not occur until the year 1815. And even in that case, ~~1815. At that time the case of~~ (Hunt v. Tarzay) the judgment of the Supreme Court was

~~possibly~~ carried into effect, according to the existing laws, without endangering the peace of the country.

The last topic, to which we would advert, is the claim which has been set up to exempt the judgments obtained by the States of this Union, before their own Courts, in civil & criminal suits prosecuted in their name, from being reviewed by the Supreme Court of the United States upon a writ of error. Much stress has been laid by those who sustain this claim, upon the general proposition, that a sovereign independent State cannot be sued, ^{except} ~~but~~ by its own consent. But does this proposition apply, in its extent, to the States of this Union? That is the question for discussion.

We have in this country an authority much higher than ^{that of} ~~Sovereign~~ States. It is ^{the authority} ~~that~~ of the sovereign people of each State. In their State Conventions, they ratified the constitution of the United States; and so far as that Constitution has deprived the States of any of the attributes of sovereignty, they are bound by it, because such was the will of the people. The constitution thus called into existence by the will of the people of the several States ~~declares~~, has declared itself, & the laws & treaties which should emanate from its authority, to be "the Supreme law of the Land;" and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State, to the contrary notwithstanding.

Why then should a State, who has obtained a judgment in her own Courts against an individual, in violation of this

~~Supreme Law of the Land~~

See D.P.

"Supreme Law of the Land" be protected from having ~~the~~ ^{her} judgment reversed by the ~~Supreme Court of the United States~~ ^{Supreme Court of the United States}? Is there any ~~judicial power of the Union which applies~~ ^{to all cases} reason, either in the Constitution, or in natural justice, why judgments obtained by a State in her own Courts should be held sacred, notwithstanding ~~they~~ ^{they} violated the Constitution & Laws of the Union, which would not apply, ~~with much~~ ^{at least} with equal force, in favor of individual plaintiffs? The Constitution subjects to the review of the Supreme Court all cases in Law or equity arising under itself or the Laws of the Union. It excepts no case ^{bearing} of this character. Whether the party be a State or an individual, all must alike bow to the sovereign will of the people, expressed in ~~that Instrument~~ ^{the Constitution} of the United States.

In suits brought by a State against an individual in her own Courts, there is much greater danger of oppression, considering the relative power & influence of the parties, than there would be in controversies between individuals. And are there to be the only cases selected, in which the citizen shall not be permitted to protect himself by the Constitution & Laws ^{of the Union} ~~of his~~ before the Supreme Court of the United States? ~~It is sufficient~~ ^{Is it not} sufficient that under the Constitution, the States cannot be sued as defendants; without adding to this, by a strained & unnatural construction, the additional privilege, that the judgments which they ^{may} ~~have~~ obtained as plaintiffs or prosecutors before their own Courts - whether right or wrong, shall in all cases be irreversible?

Clifford

We will not repeat the considerations which have been already
 urged to prove, that unless these provisions of the Constitution
 apply to the States, the rights of individuals will be sacrificed,
 all uniformity of decision abandoned, & each one of the States
 will have it in her power to set the Constitution & Laws of
 the United States at defiance. ~~All prosecutions against~~
~~criminal offences are conducted in the name & by the authority~~
~~of the State within which they are committed.~~

The eleventh amendment to the Constitution of the United States interferes in
 no respect with the principles for which we have contended. ~~It prevents~~
~~an agent from being instituted or prosecuted in the Courts of~~
~~the Union against it is in these words:~~ "The judicial power of the
 United States shall not be construed to extend to any suit in law
 or equity commenced or prosecuted against one of the United States,
 by citizens of another State, or by citizens or subjects of any
 foreign State"

Chief Justice Marshall in delivering the opinion of the Court
 in the case of Cohens v. Virginia, has given so clear, ^{correct} ~~and~~ ~~in our opinion so~~ ~~clear~~ ~~and~~ ~~in our opinion so~~
 an exposition of the ^{true} ~~true~~ construction of this amendment, that
 we shall ^{in conclusion present} ~~take the liberty of presenting~~ to the House a few
 extracts from that opinion, instead of ^{any argument of our own} ~~our own~~ ~~argument~~. He says
 that "the first impression made on the mind by this amendment is,
 that it was intended for those cases, & for those only, in which
 some demand ~~is made~~ against a State is made by an individual
 in the Courts of the Union. If we consider the causes to which

It is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relation between the whole & its parts, as to strip the government of the means of protecting, by the instrumentality of its Courts, the constitution & laws from active violation. The words of the amendment appear to the Court to justify & require this construction."

Again - "To commence a suit, is to demand something by the institution of process in a Court of Justice; and to prosecute the suit, is, according to the common acceptance of language, to continue that demand. By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the act is still the same. Suits had been commenced in the Supreme Court against some of the States before the amendment was introduced into Congress, & others might be commenced before ^{it should be} adopted by the State Legislatures, and might be depending at the time of its adoption. The object of the amendment was not only to prevent the commencement of future suits, but to arrest the prosecution of those which might be commenced when this article should form a part of the Constitution. It therefore embraces both objects; and its meaning is, that the judicial power shall not be construed to extend to any suit which may be commenced, or which, if already commenced, may be prosecuted against a State by the citizens of another State. If a suit, brought in one Court, & carried by legal process to a supervising Court, be a continuation of the same suit, then this suit is not commenced ^{not} prosecuted against a State. It is clearly in its commencement the suit of a State against an individual, which suit is transferred to this Court, not for the purpose of asserting any claim against the State, but for the purpose of asserting a constitutional defence against a claim made by a State."

Phillips

Under the Judiciary act, the effect of a writ of error is simply to bring the record into Court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where then a State obtains a judgment against an individual, and the Court, considering such judgment, over-rules a defence ^{the transfer of this record into the Supreme Court, for the sole purpose of inquiring whether the judgment violates the Constitution & laws of the United States} set up under the Constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of any thing. Essentially, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given rather than ^{an} appeal, because it is the more usual mode of removing suits at common law; and because, perhaps, it is more technically proper where a single point of law, and not the whole case, is to be re-examined. But an appeal might be given, and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form, and not substance. Whether it be by writ of error, or appeal, no claim is asserted, no demand is made by the original defendant; he only asserts the constitutional right, to have his defence examined by that tribunal whose province it is to construe the Constitution & laws of the Union.

"The only part of the proceeding which is in any manner personal is the citation. And what is the citation? It is simply notice to the opposite party, that the record is transferred into another Court, where he may appear, or decline to appear, as his judgment or inclination may determine. To the party who has obtained a judgment is out of Court, and may, therefore, not know that his cause is removed. Common justice requires that notice of the fact should be given him. But this notice is not a suit nor has it the effect of process. If the party does not choose to appear, he cannot be brought into Court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his non-appearance, but the judgment is to be re-examined, & reversed or affirmed, in the manner as if the party had appeared & argued his cause."

"Peters

The point of view in which this writ of error, with its citation, has been considered uniformly in the Courts of the Union, has been well illustrated by a reference to the course of this Court in suits instituted by the United States. The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the Judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a Superior Court, where they have like those in favor of an individual, been re-examined and affirmed or reversed. It has never been suggested, that such writ of error was a suit against the United States, and therefore, not within the jurisdiction of the Appellate Court."

"It is then the opinion of the Court, that the defendant who removes a judgment rendered against him by a State Court into this Court, for the purpose of re-examining the question, whether that judgment be in violation of the Constitution or laws of the United States, does not commence or prosecute a suit against the State, whatever may be its opinion where the effect of the writ may be to restore the party to the possession of a thing which he demands."

At which is respectfully submitted

James Buchanan

William W. Ellsworth

F. D. White

Views of the Minority
to follow report - J. W. Davis

Print all together